

§ 778.326

less than 50 hours in a particular week, deductions are made at a rate of \$5.50 per hour for the hours not worked.

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§ 778.326 Reduction of regular overtime workweek without reduction of take-home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of \$5 an hour and regularly worked 50 hours, earning \$275 as his total straight time and overtime compensation, and the parties now agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from \$5 per hour to \$6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be \$285. The parties cannot, however, agree that the employee is to receive exactly \$285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee

29 CFR Ch. V (7-1-10 Edition)

under such a plan until the workweek exceeded 50 hours.

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§ 778.327 Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate at \$6 per hour for all workweeks in which the employee worked 40 hours or less, approximately \$5.93 per hour for workweeks of 41 hours, approximately \$5.86 for workweeks of 42 hours, approximately \$5.45 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime at these "rates") \$6 an hour regardless of the number of overtime hours worked. This is an obvious book-keeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See *Walling v. Green Head Bit & Supply Co.*, 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, \$6 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide \$6 rate usually working 50 hours and taking home \$330 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to \$7.65 for such weeks so that their total compensation is \$328.95 for a 42-hour week the question may properly be asked, when they return to the 50-hour week, whether the \$6 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra \$1.05 or is their "regular" rate really now \$7.65 an hour since this is